

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ,  
Plaintiff,  
v.  
KENNETH JOHNSON,  
Defendant.

1:20-CR-00238 -JLT-SKO

**FURTHER ORDER RE  
COURTROOM/TRIAL PRACTICES;  
FURTHER ORDER RE: U.S. v. MIRABAL**

## I. Courtroom decorum

Before this trial began, the Court issued an order providing guidance as to the conduct of counsel during trial (Doc. 1663). Counsel SHALL read and abide by that order. The Court reiterates key points here.

First, objections are limited to stating the legal basis for them. There will be no speaking objections. (Doc. 1663 at 2). On the other hand, if counsel fail to state a legal basis for the objection, the Court will deny the objection as waived. Second, if counsel wish to refer to a document that has not been marked, they **SHALL** first provide it to the courtroom deputy clerk for marking (*Id.* at 1), and they **SHALL** provide the Court with a copy of the document for its reference, before the document is used in any manner with a witness. Finally, counsel **SHALL** direct their arguments to the Court and not to other counsel. *Id.*

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1      **II.      *United States v. Mirabal***

2            At trial, counsel for Mr. Johnson asserted that statements by the government are not  
 3      hearsay under according to Rule 801(d)(2). There is little doubt that this is true. However, conse  
 4      has since seemed to take the position that every statement by a government attorney is covered by  
 5      the Rule and cited *United States v. Mirabal*, 98 F.4th 981, 986 (9th Cir. 2024) for this  
 6      proposition. In *Mirabal*, the Ninth Circuit found that a sworn statement by a government attorney  
 7      constitutes a statement by a party opponent for purposes of Rule 801(d)(2). The Court agreed  
 8      with defense counsel and disagreed with the government's position that *Mirabal* is limited to  
 9      sworn statements of the government's attorney.

10           Other courts have found that statements of government attorneys are not hearsay under  
 11     Rule 801(d)(2) though, seemingly, only as to the statements on which the attorney intends the  
 12     Court to rely. *See United States v. Kattar*, 840 F.2d 126, 130–31 (1st Cir. 1988) [Positions taken  
 13     in briefs filed with the court are statements by a party opponent]. The Court agrees with this  
 14     rationale but finds that the Rule does not limit the statements only to those the government  
 15     attorney makes in court filings or under oath. The Rule simply does not contemplate this  
 16     limitation. Even still, because the party opponent in a criminal prosecution is the *government* and  
 17     not the individual attorney, not every statement made by a government attorney is made with the  
 18     imprimatur of the government.<sup>1</sup> Each statement must be considered in context to determine  
 19     whether Rule 801(d)(2) applies.<sup>2</sup>

20           On the other hand, the Court is aware of no authority for the proposition that the unsworn  
 21     statements of a law enforcement officer are admissible as non-hearsay under Rule 801(d)(2), and  
 22     *Mirabal* does not contemplate this. *See United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir.  
 23     1979); *United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir.1975); *United States v. Powers*,  
 24     467 F.2d 1089, 1095 (7th Cir.1972).

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 26     <sup>1</sup> This is consistent with the instruction that evidence at trial does not include statements, arguments or  
 27     questions by counsel. 9th Cir. Crim. Jury Inst. 1.4 (2019); 9th Cir. Crim. Jury Inst. 6.7 (2018)  
 28     <sup>2</sup> If the Rules applies and the witness' prior statement is otherwise admissible under Rule 613(b), the  
 29     question or statement to which he is responding, in general and in appropriate circumstances, may also be  
 30     used. In this event, the statement or question, is not evidence. The evidence is only that which comes from  
 31     the witness.

Based on the foregoing and unless the Court is provided other authority that contradicts that which is set forth here and analyzed, the Court will expect compliance with this order.

IT IS SO ORDERED.

Dated: February 2, 2025

Jennifer L. Thurston  
UNITED STATES DISTRICT JUDGE